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# IN THE COURT OF APPEALS OF INDIANA

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| RUSSELL A. LUCAS, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 03A01-0609-CR-393 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-0605-FB-913

**February 23, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

Russell A. Lucas appeals his eighteen-year sentence for class B felony burglary. We affirm.

## Issue

Lucas raises one issue, which we rephrase as whether his sentence is inappropriate in light of the nature of the offense and his character.

## Facts and Procedural History

On April 29, 2006, Lucas broke into a Bartholomew County residence with the intent to commit theft. On May 5, 2006, the State charged Lucas with class B felony burglary,[1] class B felony unlawful possession of a firearm,[2] and class D felony theft.[3] On July 6, 2006, the trial court granted Lucas's motion to withdraw not guilty plea and enter guilty plea to class B felony burglary. Appellant's App. at 30. The State dismissed the two remaining charges.

On August 14, 2006, the trial court accepted Lucas's guilty plea and sentenced Lucas to the Department of Correction for eighteen years, executed. The trial court considered the presentence investigation report and found two aggravating circumstances: Lucas's criminal history and the fact that he was on parole at the time of this offense. *Id*. at 36; Tr. at 27. Lucas now appeals.

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[1] Ind. Code § 35-43-2-1.

[2] Ind. Code § 35-47-4-5.

[3] Ind. Code § 35-43-4-2.

## Discussion and Decision

Lucas challenges the appropriateness of his sentence. He committed the offense for which he was sentenced after our legislature adopted our current statutory sentencing scheme in response to *Blakely v. Washington*, 542 U.S. 296 (2004), and *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), *cert. denied*. Thus, the new statutory scheme applies here.

Indiana Code Section 35-50-2-5 provides that a person who commits a class B felony "shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." Article 7, Section 6 of the Indiana Constitution authorizes this Court to review and revise criminal defendants' sentences. Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006).

Here, the trial court found aggravating circumstances to support its imposition of the eighteen-year sentence. Pursuant to the new sentencing scheme, a court may impose any sentence that is authorized by statute and permissible under the Constitution of the State of Indiana "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). Although the trial court is not required to find aggravating or mitigating circumstances, if the court does find aggravating or mitigating circumstances, it must issue a statement with its reasons for selecting the sentence that it imposes. Ind. Code § 35-38-1-3. However, Lucas does not challenge his sentence in terms

of the finding of aggravating and mitigating circumstances. Rather, he articulates his argument in terms of the appropriateness of his sentence. We therefore review his sentence within this framework.[4]

As to the nature of the offense, Lucas argues that the burglary he committed is unremarkable. The State agrees that the factual basis of the offense does not warrant the imposition of a sentence beyond the advisory. However, the State argues, and we agree, that it is Lucas's character that substantiates the sentence imposed by the trial court.

Lucas's character is manifested by his apparent inability and/or unwillingness to conform his actions to the laws and rules that govern society. Lucas committed the instant offense at the age of thirty-seven. In 1986, he was convicted of class B felony attempted rape and class C felony battery. He was sentenced to twenty-eight years, with thirteen years suspended and thirteen years probation upon release. In 1996, Lucas was released on probation. In 1999, he was convicted of class A misdemeanor possession of marijuana. In 2001, his probation was revoked following four probation violations, and he was ordered to serve the thirteen-year suspended sentence. During his incarceration, Lucas committed more than sixty infractions, including possession of a weapon, attempted escape, disorderly conduct, stealing, fleeing, lying to staff, insolence, and physically resisting. He was released

[4] We recognize that another panel of this Court has held that Indiana Code Section 35-38-1-7.1 requires us to blend our review of the trial court's finding of aggravating and mitigating circumstances into our review of the appropriateness of the sentence. *McMahon v. State*, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006). We do not agree with this view. *See Windhorst v. State*, 858 N.E.2d 676, 678 (Ind. Ct. App. 2006), *trans. granted*. In addition, our supreme court is currently reviewing whether, pursuant to Indiana Code Section 35-38-1-7.1(d), any error relating to the trial court's finding of aggravating and mitigating circumstances is harmless. *See Anglemyer v. State*, 845 N.E.2d 1087, 1091 (Ind. Ct. App. 2006), *trans. granted*.

on parole in June 2005. In less than a year, and while still on parole, he committed the instant offense while under the influence of crack cocaine. Tr. at 20. This history of persistent disregard for the law throws doubt on his claim that his guilty plea, his cooperation with police, and his expression of remorse demonstrate his good character. Accordingly, we conclude that his eighteen-year sentence is appropriate in light of his character.

Affirmed.

SHARPNACK, J., concurs.

SULLIVAN, J., concurs in result with separate opinion.

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**SULLIVAN, Judge, concurring in result**

I am unable to fully concur because I disagree with Footnote 4. In this respect I believe the analysis set forth in McMahon v. State, 856 N.E.22d 743 (Ind. Ct. App. 2006) is preferable to that found in Windhorst v. State, 858 N.E.2d 676 (Ind. Ct. App. 2006). As the majority here notes, our Supreme Court has granted transfer in Windhorst, as it did in Anglemyer v. State, 845 N.E.2d 1087 (Ind. Ct. App. 2006). The decisions in the latter two cases have, therefore, been vacated. My agreement with McMahon is premised upon the legal analysis contained therein rather than upon the fact that it is the only Court of Appeals decision on the issue with precedential value.